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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/829,105	04/21/2004	Douglas Leith	FRO-001.01	6483

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FOLEY HOAG, LLP
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BOSTON, MA 02110

EXAMINER

SHIVERS, ASHLEY L

ART UNIT	PAPER NUMBER
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2619

MAIL DATE	DELIVERY MODE
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02/08/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/829,105

Applicant(s)

LEITH ET AL.

Examiner

ASHLEY L. SHIVERS

Art Unit

2619

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 January 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-6, 8, 11-17, 19, 21, 22, 25-27, 32, 35, 36 and 43-46 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-6, 8, 11-17, 19, 21, 22, 25-27, 32, 35, 36 and 43-46 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 21 April 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Response to Amendment

1. Applicant's amendment filed on January 2, 2008 has been entered. Claims 1-6, 8, 11-12, 19, 21-22, 25-27, 32, 35 and 43 have been amended. Claims 7, 9-10, 18, 20, 23-24, 28-31, 33-34 and 37-42 are canceled. Claims 44-46 have been added. Claims 1-6, 8, 11-17, 19, 21-22, 25-27, 32, 35-36 and 43-46 are still pending in this application, with claims 1, 12, 22, 32 and 44-46 being independent.

Claim Objections

2. Claims 12, 32 and 44-46 are objected to because of the following informalities:

--In accordance with MPEP 2111.04, the claim language of claims 12, 32 and 44-46 suggests or makes optional but does not require steps to be performed. In *Hoffer v. Microsoft Corp.*, 405 F.3d 1326, 1329, 74 USPQ2d 1481, 1483 (Fed. Cir. 2005), the court held that when a "'whereby' clause states a condition that is material to patentability, it cannot be ignored in order to change the substance of the invention." *Id.* However, the court noted (quoting *Minton v. Nat'l Ass'n of Securities Dealers, Inc.*, 336 F.3d 1373, 1381, 67 USPQ2d 1614, 1620 (Fed. Cir. 2003)) that a "'whereby clause in a method claims is not given weight when it simply expresses the intended result of a process step positively recited.'" *Id.* Although these claim involve the wherein clause, the above reasoning for objection remains the same.

--In claims 1 and 22, the ";" after "*cwnd_i*" and before "comprising" should be removed.

--In claim 22, the ":" should be removed after "wherein".

--In claims 44-46, there should be a ":" after "wherein" to separate the claim limitation from the preamble.

Claim Rejections - 35 USC § 101

3. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 1-6, 8, 11-17, 19, 21-22, 25-27, 32, 35-36 and 43-46 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. In the claims a method/networking component, respectively are being recited; however the independent claims, as well as the dependent claims, do not produce a practical application that is sufficient. The practical application, in claim 1 for example, states "permitting packets to be transmitted over the network link in accordance with the value of *cwnd_i* set in step c". While this is an insignificant post activity, the scope of the claim is not changed by adding this limitation. The specification, also, does not provide a practical application.

Claim Rejections - 35 USC § 112

4. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

5. Claims 1-6, 8, 11-17, 19, 21-22, 25-27, 32, 35-36 and 43-46 are rejected under 35

U.S.C. 112, first paragraph, as failing to comply with the written description

requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The Applicants state in independent claims 1, 12, 22, 32 and 44-46 that in accordance with the congestion window value, the packets are permitted to be transmitted. This, however, is not supported by the specification. While the Applicant discloses how to determine the values of the variables in the algorithms provided, they fail to disclose the logic behind permitting the packets to be transmitted based on the congestion window value. The Applicants further state in claims 21 and 43 executable computer code stored on a computer readable medium but fail to disclose what is considered computer readable medium in the specification, thereby rendering this new matter as well.

6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

7. Claims 1-6, 8, 11-17, 19, 21-22, 25-27, 32, 35-36 and 43-46 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In claims 1 and 12 the Applicant fails to define what β_i and δ . In claims 1, 12, 22, 32 and 44-46 the last limitation is not supported in the specification.

Claims 1, 12, 22, 32 and 44-46 recite the limitation "the number of unacknowledged packets". There is insufficient antecedent basis for this limitation in the claim.

Response to Arguments

8. Applicant's arguments with respect to claims 1-6, 8, 11-17, 19, 21-22, 25-27, 32, 35-36 and 43-46 have been considered but are moot in view of the new ground(s) of rejection.

9. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Conclusion

10. Any response to this action should be **faxed** to (571)273-8300 or **mailed** to:

Commissioner of Patents,
P.O. Box 1450
Alexandria, VA 22313-1450

Hand delivered responses should be brought to:
Customer Service Window
Randolph Building
401 Dulany Street
Alexandria, VA 22314

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to ASHLEY L. SHIVERS whose telephone number is (571)270-3523. The examiner can normally be reached on Monday-Thursday 8:00-6:00 EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jay Patel can be reached on (571) 272-2988. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/ Ashley L Shivers/
Examiner, Art Unit 2619
1/24/2008


CHIRAG G. SHAH
PRIMARY PATENT EXAMINER